

# Memorandum

To: Docket 04-IEP-1

Date : November 5, 2004

Telephone:

From : **California Energy Commission**  
1516 Ninth Street  
Sacramento CA 95814-5512

Subject: **Guidance on Confidentiality of Electricity Demand and Retail Price Information**

At the November 3, 2004 Business Meeting, the Energy Commission adopted forms and instructions for submitting information relating to electricity demand and retail price forecasts from all load-serving entities (LSEs) with load greater than 200 megawatts (MW). At the Business Meeting and at the September 20 and 21 workshops on the proposed forms and instructions, LSEs raised concerns about the Energy Commission's process for determining confidentiality and the handling of confidential data. This memo provides initial guidance on the Energy Commission's process for determining whether data is entitled to confidential treatment as well as its procedures for handling confidential data.

## General Guidance

The Energy Commission is committed to conducting the 2005 Integrated Energy Policy Report (Energy Report) proceeding in an open and transparent fashion. We believe that public access to information is essential to an open, public debate on key energy issues facing the state. The Energy Commission's general premise is that information that forms the basis for key policy and procurement decisions should be disclosed to the public unless there is a specific reason not to do so. The Energy Commission has twice submitted comments to the California Public Utilities Commission in its procurement rulemaking (R.01-10-024) advocating that most planning information be made available to the public. At the same time, the Energy Commission recognizes that existing laws and regulations provide a basis for keeping certain types of data confidential.

## Specific Guidance

Several parties identified specific confidentiality concerns at the workshops and in writing. Most of the concerns focused on the electricity demand and retail price forecast forms and instructions. This information is most likely to be designated as confidential if it contains trade secrets or its disclosure would otherwise cause loss of a competitive advantage to the filer. Records that contain trade secrets are generally not considered public records subject to disclosure under the Public Records Act. (Gov. Code, sec. 6254.7(d), (e).) Whether a particular document constitutes a "trade

secret” is a question of law, not fact. Generally, the California Courts have used the following definition of trade secret:

a trade secret may consist of any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. . . . (Uribe v. Howie (1971) 19 Cal.App.3d 194, 207-208, from the Restatement of Torts, vol. 4, sec. 757, comment b, p. 5.)

Information that reveals customer-specific data is also likely to be designated confidential. In addition, any information that does not fall into these categories may be deemed confidential if the filer can demonstrate that, on the facts of the particular case, the public or private interest served by not making the information public clearly outweighs the public interest served by disclosure of the information.

Responses to other specific concerns are as follows:

- **Electricity Service Provider (ESP) data:** Some ESPs have recommended that the Energy Commission designate all data as confidential unless aggregated to the state level. Filers who request this treatment pursuant to an application for confidentiality should include in their application a demonstration of why this is the minimum level of aggregation needed to protect customer or trade secret information. Parties should note that Energy Commission staff has published historic ESP sales data aggregated to the utility distribution area level, along with staff forecasts of total ESP load. This is due to the fact that given the number of competitors, it would be extremely difficult to infer ESP-specific information at the utility distribution level. However, given the current number of ESPs serving various sectors at the distribution level, data reported by distribution area and major customer sector could uniquely identify loads of specific ESPs. Therefore, a filer may be able to justify keeping sector-level data confidential.
- **Customer-specific data:** Another confidentiality concern could arise if any of the requested forecast data or discussion of assumptions reveals characteristics or plans of individual customers. In such cases, filers should identify the specific variables, and explain how publication of this data would violate customer privacy and/or disclose customer trade secrets.
- **Retail price forecast information:** The retail price forms generally ask for similar information from investor-owned utilities (Form 1), municipal utilities (Form 2), and electricity service providers (Form 3). For the investor-owned and municipal

utilities, the general revenue requirement information being requested is generally publicly released and discussed in other forums, and so is likely to be considered public at the Energy Commission. For electricity service providers, this same type of information could provide significant insight into business strategies in a way that could harm the competitive situation of the filer. For this reason, such a showing in a confidentiality application for the information requested in Form 3 is likely to be considered sufficient to deem such information confidential.

- **Hourly load forecasts:** Form 1 for demand generally requests historic and forecast energy and capacity needs. The primary confidentiality concern raised by parties relating to this information is the handling of the hourly load forecast (Form 1.6). Filers wishing to keep this information confidential should include in their application a description of how release of this information would harm them, the length of time the submitted materials should remain confidential, and the reason that the identified length of time is appropriate. Evaluation of applications for confidentiality of hourly load forecasts will need to be based on the specific information and the justifications provided for keeping the information confidential.

This guidance is not intended to be comprehensive. If a party believes that information requested in these forms and instructions that is not discussed above needs to be kept confidential, the party should file an application for confidentiality following the procedures below. Such applications will be judged on their merits.

### **Energy Commission Confidentiality Procedures**

The guidance above does not relieve parties of the obligation to file an appropriate application for confidentiality nor is it intended to pre-judge any applications for confidentiality as each application will be evaluated on its specific merits. Under Energy Commission regulations, the burden is on the filing party to provide adequate and appropriate justification for the confidential treatment of any information filed with the Energy Commission. In addition, parties should be aware that the Energy Commission's regulations allow release of information if it has been masked or aggregated to the point necessary to protect confidentiality; this is true even where information has been deemed to be eligible for confidential treatment. The specific masking and aggregation requirements are found in the Energy Commission's confidentiality regulations, which also require consultation with a filer before masked or aggregated data is released. (Cal. Code Regs., tit. 20, 2501 et seq.)

The Energy Commission must follow applicable laws and regulations regarding the handling of confidential information. Under the Energy Commission's regulations,

parties seeking confidential designation for information filed must submit an application for confidentiality along with the information. The Executive Director evaluates applications for confidentiality based on all confidentiality and open government laws. (See California Public Records Act found at Gov. Code, sec. 6250 et seq.; and the Commission's Regulations found at Cal. Code Regs., tit. 20, sec. 2501 et seq.) Information filed with an application for confidentiality will be kept confidential while the application is reviewed.

A properly filed application for confidentiality must include:

- The materials seeking the confidentiality designation;
- A statement noting what part(s) of the submitted materials need a confidential designation;
- A statement giving the length of time the submitted materials should remain confidential, and the reason for that length of time;
- A statement indicating the provisions of the Public Records Act or other applicable California laws that allow the Energy Commission to deem the submitted materials as confidential, and an explanation as to why those provision(s) apply;
- If the applicant believes that the record should not be disclosed because it contains trade secrets or its disclosure would otherwise cause loss of a competitive advantage, the applicant shall also state the specific nature of that advantage and how it would be lost, including the value of the information to the applicant, and the ease or difficulty with which the information could be legitimately acquired or duplicated by others;
- A signed declaration, under penalty of perjury, that the application for confidentiality is true, correct, and complete to the best of the applicant's knowledge and belief. This declaration must be signed by a person authorized to sign on behalf of the applicant; and
- A declaration that the submitted materials have not been publicly released and a statement of whether those materials can be masked or aggregated and released to the public.

Applications for confidentiality are evaluated on a case-by-case basis. It is the applicant's responsibility to justify the need for confidentiality. Consequently, the Energy Commission cannot guarantee that similar information submitted by two different applicants will be designated as confidential since each application is unique. In addition, parties should recognize that the different regulatory and market

participation status of municipal utilities, investor-owned utilities, and electricity service providers will also likely affect whether similar information is considered confidential for one type of LSE and not for another.

An applicant seeking a confidentiality designation for information submitted to the Energy Commission can appeal if the Executive Director denies the request for confidentiality. The applicant has fourteen days from the date of the Executive Director's decision to file an appeal. Within four weeks of the filing of an appeal, the Energy Commission is required to issue a decision on the appeal. (Cal. Code Regs., tit. 20, sec. 2501 (a)(3)(B).)

In limited cases, information is entitled to automatic designation as confidential without an application for confidential treatment. (Cal. Code Regs., tit. 20, sec. 2505 (a)(5).) The Energy Commission's confidentiality regulations specifically identify the categories of data eligible for automatic confidentiality. Information submitted to the Energy Commission as automatically confidential must be labeled as confidential and include a statement signed under penalty of perjury that the information has not been previously released and qualifies for automatic confidentiality under the Energy Commission's regulations.

## **Conclusion**

This guidance is intended to provide direction on the approach the Executive Director will use in reviewing applications for confidentiality, and is based on a general review of the types of information requested from different categories of load-serving entities. The specific information provided and the particular circumstances of a given LSE as reflected in the application for confidentiality will determine whether particular information will be designated as confidential. Each application will be evaluated on a case-by-case basis. Questions relating to the Energy Commission's confidentiality procedures can be directed to Fernando De Leon, Senior Staff Counsel, at (916) 654-4874, or by email at [Fdeleon@energy.state.ca.us](mailto:Fdeleon@energy.state.ca.us).

Sincerely,

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ROBERT L. THERKELSEN  
Executive Director